Filed 12/28/18 In re Bobby Y. CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re BOBBY Y., a Person Coming Under the Juvenile Court Law.	
SOLANO COUNTY HEALTH & SOCIAL SERVICES DEPARTMENT, Plaintiff and Respondent, v. J.S., Defendant and Appellant.	A154638 (Solano County Super. Ct. No. J38677)

J.S. (mother) appeals the juvenile court's June 16, 2018 order terminating her parental rights over her ten-year-old son, Bobby S., contending the court erred in declining to apply the beneficial parent-child relationship exception to adoption.[1] (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(i).) She also argues the ICWA notice given in the case was defective. We reject the former argument, but reverse and remand the juvenile court's order for the limited purpose of curing the ICWA violation, which error the Solano County Health and Social Services Department (the "Department") concedes.

[1] All further statutory references are to the Welfare and Institutions Code.

BACKGROUND

Bobby was born with severe disabilities, including a rare brain defect and a serious vision impairment. As a result, he has experienced significant developmental delays since birth, including speech, motor and cognitive delays. Mother, who has a history of drug abuse and an extensive criminal history, tested positive for methamphetamines when Bobby was born.

These proceedings were initiated in February 2015, when Bobby was seven, pursuant to a Welfare and Institutions Code section 300 petition alleging three counts of abuse and neglect. The juvenile court eventually sustained two: that his mother and father had been chronically neglecting him, by failing to get him the developmental and occupational services his disabilities necessitated; and that his parents had "untreated anger management issues" and a long history of engaging in domestic violence in front of Bobby, which put his safety at risk too.

Bobby was detained on an emergency basis and placed with his paternal grandmother, with whom he had lived before for some period.[2]

The court terminated both parents' reunification services on July 11, 2016, at a contested, twelve-month review hearing.[3] The matter eventually proceeded to a permanency planning hearing on June 8, 2018, which mother did not attend. By that time, Bobby had been living with his grandmother and her husband for three years and had a strong, loving bond with them, they had been granted de facto parent status, were meeting all of his needs,[4] very much wanted to adopt him and were in the process of securing home approval to do so. Upon the Department's recommendation, with which

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[2] Mother was incarcerated at the time.

[3] Mother was again in custody.

[4] Bobby was receiving occupational, physical, speech and language therapies as well as services for his vision. Because of his severe disabilities, Bobby needs assistance with basic daily living activities, such as going to bathroom, bathing, and dressing. And he needs to be supervised at all times for his own safety. His grandparents were meeting all of those needs.

Bobby's counsel concurred, the court terminated the parental rights of both parents and ordered adoption as the permanent plan.

Mother then timely filed this appeal.

DISCUSSION

I.

The Parental Benefit Exception

Mother argues the order terminating parental rights is not supported by substantial evidence because the parental benefit exception applied. (§ 366.26, subd. (c)(1)(B)(i).)

This issue is forfeited, because she did not raise it below. The juvenile court has no *sua sponte* duty to determine whether one of the statutorily enumerated exceptions to adoption applies, including the parental benefit exception, because a parent bears the burden of proof demonstrating an exception's applicability. (*In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1252.) It therefore follows that a parent who fails to raise an exception to adoption at the section 366.26 hearing forfeits the issue on appeal. (See *ibid.* [parental benefit exception]; accord, *In re Daisy D.* (2006) 144 Cal.App.4th 287, 292 [sibling relationship exception]; *In re Erik P.* (2002) 104 Cal.App.4th 395, 403 [same]; *In re Rachel M.* (2003) 113 Cal.App.4th 1289, 1295 [beneficial relationship exception].) And although we have discretion in some instances to consider an issue notwithstanding a party's failure to raise it below (such as issues that are purely legal), we decline to do so here. Application of the parental benefit exception raises factual issues that are not suitable for this court to decide for the first time on appeal. (See, e.g., *Daisy D.*, at p. 293.) Indeed, mother concedes that this issue is governed by the substantial evidence standard. "The application of any of the exceptions enumerated in section 366.26, subdivision (c)(1) depends entirely on a detailed analysis of the relevant facts by the juvenile court. [Citation.] If a parent fails to raise one of the exceptions at the hearing, not only does this deprive the juvenile court of the ability to evaluate the critical facts and make the necessary findings, but it also deprives this court of a sufficient factual record from which to conclude whether the trial court's determination is supported by substantial evidence. [Citation.] Allowing [a parent] to raise the exception for the first time on

appeal would be inconsistent with this court's role of reviewing orders terminating parental rights for the sufficiency of the evidence. Therefore, the [parent] has waived [their] right to raise the exception." (*Erik P.*, 104 Cal.App.4th at p. 403.)

II.

ICWA

Mother also argues that the notice given in this case pursuant to the Indian Child Welfare Act (ICWA) was defective, because the Department failed to obtain certain basic, available demographic information about her own father, who told the Department he had Indian ancestry. The Department concedes its inquiry was deficient, and argues that a limited reversal and remand is appropriate so that it can cure the violation, make proper inquiry and give proper notice in accordance with ICWA.

We agree, and a limited reversal and remand for that purpose will be ordered. On April 25, 2016, maternal grandfather stated he had Seminole ancestry. The Department concedes that, after that, it never asked him (or mother) his date of birth, place of birth or former address(es), and its ICWA notice therefore was defective because the notice said no information concerning those subjects was available. (See, e.g., *In re Francisco W.* (2006) 139 Cal.App.4th 695, 703 [notice must include such information where available].) Where the only defect in an order terminating parental rights is noncompliance with the Indian Child Welfare Act (ICWA), the disposition suggested by the Department is appropriate. (See *id*. at pp. 704–705.)

DISPOSITION

The order terminating parental rights is reversed and the case is remanded to the juvenile court with directions to order the Agency to comply with the notice provisions of ICWA and the views expressed in this opinion. If, after proper notice, a tribe claims Bobby W. is an Indian child, the juvenile court shall proceed in conformity with all requirements of ICWA. If no tribe claims Bobby W. is an Indian child, the order terminating parental rights shall be reinstated.

STEWART, J.

We concur.

KLINE, P.J.

MILLER, J.

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